82-329

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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PETER ROMANO,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether Petitioner's Sixth Amendment right to a public trial was violated when, during the trial court's instructions to the jury, no member of the public was permitted to enter or leave the courtroom.

Parties to the proceeding in the Court of Appeals were:

The United States of America, Carmine Romano and Peter Romano.

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 24, 1982.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit has not yet been officially reported. It is bound with this Petition as the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 24, 1982. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment

The pertinent provisions of the Sixth Amendment to the Constitution of the United States read as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . . .

STATEMENT

Petitioner was tried jointly with his brother Carmine[1] upon a multi-count indictment. The facts of this case—insofar as they are relevant here—may be briefly set forth as follows:

Local 359 of the United Seafood Workers, Smoked Fish and Cannery Union ("Local 359") has represented the workers in the New York City Fulton Fish Market for many years. In May of 1980, Petitioner replaced his brother Carmine as its chief official and, as such, was responsible for Local 359's continued receipt of monthly payments of twenty-five dollars from numerous of its members' employers for the rental of plastic union plaques. Those payments were received on a monthly basis until mid-December of 1980, when Local 359 was indicted for receiving them.[2] During the continued grand jury investigation of the affairs of Local 359, Petitioner responded to a grand jury subpoena *duces tecum* directed toward the union and, testifying before the grand jury, denied possession of a document ostensibly called for by the subpoena.

Thereafter, Petitioner was indicted by a grand jury sitting in the Southern District of New York for thirty-one violations of 29 U.S.C. §186 (in connection with Local 359's receipt of the plaque rental payments) and for one count each of obstruction of justice and of making a false declaration, in violation of 18

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[1] We understand that Carmine Romano is also filing a petition for a writ of certiorari. We hereby adopt, with the permission of this Court, the second point raised by him concerning the unconstitutionality of the Second Circuit rule requiring no *mens rea* for a conviction under 29 U.S.C. §186(b).

[2] Based upon the receipt of this very plaque rental money, Local 359 was convicted of forty-six violations of 29 U.S.C. §186. On September 30, 1981, the Second Circuit affirmed the conviction. This Court denied certiorari. *Local 359, United Seafood Workers, Smoked Fish and Cannery Union v. United States*, U.S. , 102 S.Ct. 1434 (1982).

U.S.C. §§1503 and 1623 (in connection with his grand jury testimony and failure to produce the document in question). Moreover, with those crimes being used as predicate offenses, he was accused of a RICO conspiracy with his brother and others and a substantive RICO offense, in violation of 18 U.S.C. §1962.[3]

The trial of Petitioner and his brother Carmine began on October 22, 1981 in the United States District Court for the Southern District of New York before Hon. Lee P. Gagliardi and a jury. Immediately before the jury was charged on the law, and over defense objection based upon Sixth Amendment "public access" grounds, the trial court ordered the courtroom doors locked, first permitting those in attendance to leave if they wished, but thereafter permitting neither ingress nor egress by anyone during the duration of the charge.[4] The trial court stated that the sole reason for the order was to prevent distraction of the jury. Thereafter, the jury convicted Petitioner of all the charges submitted to it as to him and voted a forfeiture of his Local 359 office.

On February 5, 1982, Petitioner was sentenced to terms of imprisonment totalling eighteen months and a five-year term of probation.

REASONS FOR GRANTING THE WRIT

Petitioner's Sixth Amendment Right to a Public Trial Was Violated by the Court Order That, During Its Instructions to the Jury, No One Would be Permitted to Enter or Leave the Courtroom

From the ratification of the Sixth Amendment to the filing of this Petition, the issue of whether a defendant's right to a public trial includes the right to an open courtroom during the trial

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[3] Six others were indicted with the Romano brothers, but were severed before trial. Some of the counts ultimately submitted to the jury charged only Petitioner, some only his brother and some charged both.

[4] A specific exception to the exclusion order, however, was made for the court stenographers who would be transcribing the charge. They, unlike all others, could enter and leave the courtroom during the charge.

court's charge to the jury appears to have been directly ruled upon by a *federal* court solely by the Second Circuit in this very case.[5] We submit that a sufficient reason for granting the writ is the fact that the sole federal case in point on such a fundamentally-important federal right is dead wrong on the issue. Since its impact upon the future course of the law in this area may thus be substantial, its holding should be nipped in the bud here and now. Moreover, those state courts which have considered this issue—whether under their own constitutions or under that of the United States—have almost invariably reached the opposite result. It would be bizarre indeed if state courts interpreting Sixth-Amendment-based state constitutional provisions concerning public trial were to find in them more protection for an accused than federal courts will find in the Sixth Amendment itself.

We have discovered but six state court cases on the precise point we bring to this Court: *People v. Micalizzi*, 223 Mich. 580, 194 N.W. 540 (1923); *McKibben v. State*, 187 Ga. 651, 2 S.E.2d 101 (1939); *People v. Buck*, 46 Cal. App. 2d 558, 116 P.2d 160 (1941); *State v. Lawrence*, 167 N.W.2d 912 (Iowa 1969); *Renfroe v. State*, 49 Ala. App. 713, 275 So. 2d 692 (1973); and *State v. Gibb*, 303 N.W.2d 673 (Iowa 1981).

In *Micalizzi*, a murder conviction was reversed upon the sole ground that the defendant's right to a public trial was violated by the very practice approved by the Second Circuit in this

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[5] The only other reference to this issue which our research has disclosed in a federal case is in the opinion of Circuit Judge Edgerton, dissenting from the court's opinion on another issue, in *Walker v. United States*, 322 F.2d 434, 438 (D.C. Cir. 1963). There, Judge Edgerton stated that:

> Since a charge to the jury is a necessary part of a criminal trial, if the public is excluded from the courtroom when a charge is given, the right to a public trial is denied and the conviction must be reversed, irrespective of prejudice.

So absent are federal cases on point that Judge Edgerton cited only *People v. Micalizzi*, 223 Mich. 580, 194 N.W. 540 (1923)—a case upon which we too rely. *See* pp. 4-5, *infra*.

case.[6] Referring to "star chamber trials," the Michigan Supreme Court stated (223 Mich. at 582; 194 N.W. at 541) that:

> The defendant by the Constitution was guaranteed a public trial, not one behind locked doors; he was guaranteed a trial to which the public was admitted, not part of the public and part of the time, but the public generally and all of the time.

In *McKibben*, the trial court had given a supplemental instruction to the jurors in the jury room rather than in open court. A challenge to that event upon the ground that it violated the defendant's right to a public trial was rejected by the Georgia Supreme Court upon the sole ground that the record showed that nothing had prevented any member of the public from attending the supplemental charge in the jury room, just as he or she would have been able to do in open court.

In *Buck*, the very kind of order involved in this case was given and later challenged by the defendant. The California Court of Appeals rejected the argument because of the defendant's failure to object to the order when it was given and also because, as the defendant himself seemed to agree at the time, the order promoted the convenience of the court and all others present, including the defendant himself.

In *Lawrence*, the Supreme court of Iowa had before it a murder conviction case in which there had been an *accidental* exclusion[7] of the general public[8] from the courtroom during the charge to the jury. Recognizing that a part of the public may be excluded from a criminal trial "for good and sufficient reason," the court held however that "no more persons than are neces-

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[6] One of the defendant's attorneys, among others, was a victim of the court-ordered exclusion. The reversal, however, was based solely upon the denial of the defendant's right to a public trial and not upon any denial of his right to counsel.

[7] The exclusion was not ordered by the trial court, but was apparently based upon a bailiff's misunderstanding of a statement made by the trial court. In this case, of course, the exclusion order was no accident.

[8] The opinion does not make clear whether the defendant's family and friends were thus excluded, although the use of the term "general public" suggests that they were not.

sary to secure those proper objectives may be excluded." 167 N.W.2d at 915. The conviction was reversed because of the unnecessary and therefore improper limitation of the defendant's right to a public trial.[9]

In *Renfroe*—the only state case on point we have found which would support the Second Circuit's holding in *this* case—the Alabama Court of Criminal Appeals simply held that an order excluding the public from the courtroom during the charge to the jury was "properly a matter for the trial court's discretion and did not prevent a public trial within the sense of constitutional requirements." 49 Ala. App. 2d at 718, 275 So. 2d at 696.

Finally, in *Gibb*, the locking of the courthouse doors during an evening charge to the jury was upheld over a public trial objection only because the record showed that members of the general public who wished to hear the charge could have obtained admittance to the courtroom for that purpose by ringing a call button at the front door of the courthouse, thus summoning a janitor who would have admitted them.

Thus, with but a single exception,[10] the state cases in point either directly hold or clearly imply that the practice about

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[9] The *Lawrence* court stressed a practical advantage of having the courtroom open to the public during the judge's charge, in the following statement (167 N.W.2d at 914):

> Publicity may also be said to discourage undue emphasis by the court when charging the jury. When instructing the jury as to the law applicable to a given case, overemphasis by repetition or voice inflection could, of course, materially affect jury consideration of the matter, and such undue emphasis would not be reflected by the printed copy of the instructions later available to the public.

No claim was or could have been made at trial that Judge Gagliardi so conducted himself, nor is such a claim made here.

[10] We note that the *Renfroe* case involved a situation where the defendant made no objection to the exclusion order—a fact which may have contributed to the holding. We also note that *Renfroe* is in apparent conflict with the Alabama Supreme Court's rule generally mandating fully-open trial proceedings. *Wade v. State*, 207 Ala. 1, 92 So. 101 (1921).

which we complain constitutes a serious violation of a defendant's right to a public trial.[11]

We realize, of course, that the right to a public trial is not absolute, but is subject to reasonable limitations. We submit that the avoidance of closed-door criminal justice is so imperative that those limitations will pass constitutional muster only if based upon strict and inescapable necessity. *See, e.g., United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 607 (3d Cir. 1969).[12] And whether such a necessity exists may generally be determined only after a full and fair judicial consideration not only of all the facts, but of the more important public policies that the Sixth Amendment protects. *See, e.g., United States v. Cianfrani*, 573 F.2d 835, 854 (3d Cir. 1978); *cf. Globe Newspaper Co. v. Superior Court*, U.S. , 102 S.Ct. 2613, 2621-22 (1932). Here, no such consideration took place; the trial court merely enforced—without even a whispered hint of necessity—a local rule of practice which it noted had been followed "since the memory of man runneth not to the contrary."

We submit that the closing of the courtroom was clearly not necessary;[13] if it were, such a closing would be a standard prac-

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[11] In analogous situations, federal law is clear that even a limited exclusion of the public violates a defendant's right to a public trial. *See, e.g., United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949), where an exclusion of all persons except the defendants, their counsel, witnesses and members of the press during the selection of the jury was held to be a violation of the defendant's Sixth Amendment right to a public trial.

[12] When a *defendant* wishes to bar press and public from his trial, it has been held that he is required to show a substantial probability that a *public* trial would irreparably damage his right to a *fair* one. *See, e.g., United States v. Powers*, 622 F.2d 317 (8th Cir.), *cert. denied*, 449 U.S. 837 (1980). Even-handed justice dictates, we submit, that some similar test be employed to judge the propriety of an exclusion order—even a limited one—issued over his objection. "[T]he validity of a doctrine does not depend on whose ox it gores." *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 525 (1953) (Jackson, J., dissenting).

[13] The argument that a closed courtroom during the charge to the jury is required to prevent the distraction of the jury lacks merit. Carried to its logical conclusion, the prevention of distraction rationale could be advanced to justify closing trials in their entirety. No one could reasonably contend, however, that such a practice would be allowed by the Sixth Amendment. Singling out the instructions to the jury as particularly requiring the absence of distraction

tice throughout the country. But that is surely not the case. Counsel for Petitioner have conducted a telephonic survey of experienced criminal defense lawyers throughout the United States[14] with respect to whether the courtroom is "closed"—that is, whether ingress and egress are prohibited—during jury instructions in their federal and state trial courts. The results of that survey are as follows:

Jurisdiction	Local Courts	Federal Courts
Alabama	Rarely closed	Always closed
Alaska	Never closed	Never closed
Arizona	Never closed	Never closed
Arkansas	Never closed	Never closed
California		
(San Francisco vicinity)	Generally closed[15]	Generally closed
(Los Angeles vicinity)	Always closed	Varies by judge
(San Diego vicinity)	Rarely closed	Rarely closed
Colorado	Never closed	Never closed
Connecticut	Generally closed	Always closed
Delaware	Always closed	Always closed
District of Columbia	Always closed	Always closed
Florida		
(Miami vicinity)	Always closed	Never closed
(Jacksonville vicinity)	Always closed	Always closed

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does not withstand analysis. Any part of the charge may easily be reread to the jury. Indeed, in some jurisdictions, a written copy of the instructions is provided to the jurors. The demeanor of a crucial witness (*e.g.*, a temporary facial expression), on the other hand, cannot be recreated for a juror who was "distracted" by persons entering or leaving the courtroom.

[14] With but few exceptions, the names of the attorneys called were chosen at random from a list of lawyers with state and federal criminal trial experience contained in B. Tarlow, *National Directory of Criminal Lawyers* (1979). Should this Court so desire, we are prepared to submit an affidavit giving the names of the attorneys who provided us with the information.

[15] In the San Francisco Municipal Court, which tries countless misdemeanor cases, judges do *not* close the courtroom during the instructions to the jury. With this exception, the survey dealt with a particular jurisdiction's practice in felony trials.

Jurisdiction	Local Courts	Federal Courts
Georgia	Always closed	Always closed
Hawaii	Never closed	Never closed
Idaho	Never closed	Never closed
Illinois	Generally closed	Varies by judge
Indiana	Rarely closed	Never closed
Iowa	Never closed	Never closed
Kansas	Never closed	Never closed
Kentucky	Rarely closed[16]	Never closed
Louisiana	Rarely closed	Always closed
Maine	Varies by judge	Never closed
Maryland	Never closed	Never closed
Massachusetts	Always closed	Varies by judge
Michigan	Rarely closed	Never closed
Minnesota	Always closed	Always closed
Mississippi	Never closed	Never closed
Missouri		
(St. Louis vicinity)	Always closed	Generally closed
(Kansas City vicinity)	Never closed	Never closed
Montana	Never closed	Varies by judge
Nebraska	Never closed	Never closed
Nevada	Never closed	Never closed
New Hampshire	Always closed[16]	Always closed
New Jersey	Always closed	Generally closed
New Mexico	Never closed	Never closed
New York	Always closed	Always closed
North Carolina	Generally closed	Varies by judge
North Dakota	Always closed	Always closed
Ohio		
(Cleveland vicinity)	Never closed	Never closed
(Cincinnati vicinity)	Varies by judge	Varies by judge

[16] In the local courts of Kentucky and New Hampshire, when ingress and egress are forbidden during the charge, they are also forbidden during the attorneys' summations.

Jurisdiction	Local Courts	Federal Courts
Oklahoma	Never closed	Always closed
Oregon	Never closed	Never closed
Pennsylvania	Always closed	Always closed
Rhode Island	Always closed	Rarely closed
South Carolina	Always closed	Always closed
South Dakota	Never closed	Never closed
Tennessee		
(Nashville vicinity)	Always closed	Always closed
(Memphis vicinity)	Always closed	Never closed
Texas		
(Dallas vicinity)	Never closed	Never closed
(Houston vicinity)	Never closed	Varies by judge
Utah	Never closed	Never closed
Vermont	Never closed	Always closed
Virginia	Never closed	Always closed
Washington	Never closed	Never closed
West Virginia	Never closed	Never closed
Wisconsin	Rarely closed[17]	Never closed
Wyoming	Never closed	Never closed

The result of the poll is obvious[18]—approximately half of the jurisdictions in the country find no necessity to do what the trial court did here. We submit that a "public trial" in Manhattan should mean the very same thing as a "public trial" in Muncie if, as we have always thought, both are governed by the very same Sixth Amendment.

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[17] In the local courts of Wisconsin, those few judges who limit ingress and egress usually will not do so if the defendant objects to the practice.

[18] A tabulation of the results of the survey shows the following totals in each of our five categories which relate to the closing of the courtroom during the instructions to the jury:

	Never	Rarely	Varies	Generally	Always
Local Courts	27	7	2	4	18
Federal Courts	29	2	7	3	17

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 1175, 1185 August Term 1981
Argued: May 26, 1982 Decided: June 24, 1982
Docket No. 82-1052, 82-1054

UNITED STATES OF AMERICA,

Appellee,

—against—

CARMINE ROMANO and PETER ROMANO,

Defendants-Appellants.

Before: LUMBARD, MOORE and OAKES, *Circuit Judges.*

Defendants appeal from judgments of conviction entered in the Southern District of New York, Gagliardi, *J.*, for racketeering conspiracy, racketeering, perjury, obstruction of justice, Taft-Hartley violations, and misuse of pension funds.

Affirmed.

ROBERT LOUIS COHEN, ESQ., New York, N.Y., for Defendant-Appellant Peter Romano.

NORMAN A. OLCH, ESQ., New York, N.Y. (Dolan, MacMahon & Martine, New York, N.Y., Louis J. Martine, Esq., of counsel; William Lupo, Legal Assistant), for Defendant-Appellant Carmine Romano.

DANIEL H. BOOKIN, Assistant United States Attorney (John S. Martin, Jr.,

Southern District of New York, Andrew J. Levander, Walter P. Loughlin, Assistant United States Attorneys, of counsel), for Appellee.

LUMBARD, *Circuit Judge:*

Carmine and Peter Romano appeal from judgments of conviction entered on February 5, 1982, in the Southern District of New York, following a jury trial presided over by the Hon. Lee P. Gagliardi. The Romanos were convicted for their roles in a racketeering conspiracy to extract protection money from the wholesalers in the Fulton Fish Market. They accomplished this through their control of the union representing the workers in the market. Specifically, both defendants were convicted of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d); of violating RICO, 18 U.S.C. § 1962(c); and of aiding and abetting violations of the Taft-Hartley Act, 29 U.S.C. § 186(b)(1) and 18 U.S.C. § 2. In addition, Carmine Romano was convicted of misusing union pension funds, 18 U.S.C. § 1954 and 18 U.S.C. § 2; and Peter Romano was convicted of obstruction of justice, 18 U.S.C. § 1503, and perjury before a grand jury, 18 U.S.C. § 1623. Prior to jury deliberations, the government dropped one count of extortion, 18 U.S.C. § 1951, charged against Carmine. The court sentenced Carmine to twelve years in prison and a fine of $20,000; Peter received a sentence of eighteen months imprisonment. Finding no errors in the district court's rulings of law or in its conduct of the trial, we affirm.

In October 1981, the Romanos were charged in a 167-count indictment. Their alleged co-conspirators were severed prior to trial and the Romanos were tried on a redacted indictment of 94 counts.

Count One charged the defendants with conspiring to conduct the affairs of the Fulton Fish Market through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(d). The predicate acts of racketeering activity were alleged to include

"among other things, acts of extortion in violation of Title 18, United States Code, Sections 1951 and 2; payment and receipt of illegal labor payments in violation of Title 29, United States Code, Section 186 and Title 18, United States Code, Section 2; misuse of welfare and pension plan funds in violation of Title 18, United States Code, Sections 1954 and 2; and obstruction of justice in violation of Title 18, United States Code, Section 1503."

Among the objects and means of the conspiracy, it was charged that the defendants: (1) "would and did request and receive through, among other things, the use of fear, cash payments and other things of value from businesses in the Fulton Fish Market;" (2) "would and did request and receive through, among other things, the use of fear, approximately $66,450 from businesses in the Fulton Fish Market, supposedly in return for renting cardboard signs stating that said businesses employed members of Local 359;" (3) "did request and receive through, among other means, the use of fear, payments from businesses in the Fulton Fish Market in return for 'protection' against thefts and robberies, and did operate a protection service known as the Fulton Patrol Service . . . ;" and (4) "received for their own use and the use of their relatives and friends numerous things of value in return for depositing the funds of the Fulton Fish Market Welfare and Pension Funds into a particular bank."

Count Two charged the defendants with a substantive RICO violation, 18 U.S.C. § 1962(c). The predicate acts of racketeering activity alleged were the receipt by Carmine and Peter Romano of illegal payments in violation of 19 U.S.C. § 186(b)(1); the misuse of union pension funds by Carmine Romano, in violation of 18 U.S.C. § 1954; and the obstruction of justice by Peter Romano in violation of 18 U.S.C. § 1503.

Carmine was also charged with twelve counts of violating 18 U.S.C. § 1954 and 18 U.S.C. § 2 in connection with the receipt by him and others of television sets from the Republic National Bank as gifts for sponsoring the opening of new accounts with moneys from the union pension fund.

Counts Fifteen through Sixty and Sixty-one through Ninety-one charged Carmine and Peter respectively with aiding and

abetting violations of the Taft-Hartley Act in connection with the rental of cardboard union signs to employers in the Fulton Fish Market for $300 per year. 29 U.S.C. § 186(b)(1); 18 U.S.C. 2.

Carmine was also charged with one count of personally receiving a payment of $300 from the Booth Fisheries Co. in violation of 29 U.S.C. § 186(b)(1). Prior to submission of the case to the jury, the court dismissed, at the prosecutor's request, a count charging Carmine with extortion, 18 U.S.C. § 1951, in connection with the receipt of that payment after the witness to that count failed to testify.

Finally, Peter was charged with perjury before the grand jury, 18 U.S.C. § 1623, and with obstruction of justice, 18 U.S.C. § 1503, in connection with his false statement that he did not possess any materials responsive to a subpoena duces tecum related to the union sign rentals.

I.

The Fulton Fish Market, located just south of the Brooklyn Bridge in lower Manhattan, is the source of most of the fresh fish sold in New York. Every day from about 2 a.m. to about 8 a.m. the market is packed with trucks delivering their perishable cargoes and with customers (mostly retailers and restaurateurs) picking up their day's requirements. The market is composed of two buildings, Old and New Markets, which together house about 80 wholesalers. The approximately 800 employees of these wholesalers, who are members of Local 359 of the United Seafood Workers Union, handle the fish from the time it arrives in the market until the time that it leaves.

Carmine Romano was the Secretary-Treasurer of Local 359 from May 1974 until May 1980, when his brother, Peter Romano, took over. Carmine then assumed a newly created position (at $650/week) as the Executive Administrator of the Fulton Fish Market Welfare and Pension Trust Funds ("pension fund").

In 1975, the association of wholesalers located in the New Market, the New York Wholesale Fish Dealers Association ("Fish Dealers"), approached Carmine Romano for assistance in stopping the thefts plaguing the market. The existing watchmen's service was ineffective, and the Fish Dealers thought that Carmine would be able to protect them. The president of the Fish Dealers testified that "I figured that if the thieves knew that the union was looking out for us, that they wouldn't bother us. . . . Because they would be afraid of the union."

Shortly thereafter, Carmine created a watchmen's service called the Fulton Patrol Service. Although Carmine's name did not appear on any of the documents related to the Fulton Patrol, ample evidence tied him to the Patrol. For example, he presented the plan to the wholesalers and settled claims for reimbursement by companies that suffered thefts.

The Fish Dealers hired the Fulton Patrol Service for $1300 per week and the number of thefts in the New Market dropped dramatically. However, the Old Market, which had not hired the Fulton Patrol Service, continued to suffer high theft rates. Accordingly, in 1977 the Fulton Fishmongers Association (composed of the merchants located in the Old Market) ("Fishmongers") also hired the Fulton Patrol Service. Soon thereafter, the Old Market saw its pilferage rate drop. Between November 1975 and October 1981, the Fulton Patrol Service collected over $644,000 from the wholesale fish merchants located in the Fulton Fish Market.

Viewing the evidence in the light most favorable to the government, the jury could well have concluded that the Fulton Patrol's success in stemming the tide of thefts was due to the influence that Carmine and his co-conspirators exerted over the thieves in the market and not to the quality of its watchmen service. The deficiencies in the Patrol's operations were manifest. For example, one of the Patrol's watchmen (the brother-in-law of John Pontebbi, the man who ran the Patrol's day-to-day operations) was a kleptomaniac who was known to steal fish from the market himself. A number of watchmen listed on the payroll (and whose checks were regularly cashed by union employees)

did not exist. One watchman who did exist and who patrolled on Friday and Saturday nights had previously performed the same services for the prior, unsuccessful watchmen's service. He testified that he knew of only one other watchman who actually worked for the Patrol. Finally, a woman friend of Carmine's was paid $200 per week to receive "less than one call a week" from watchmen not reporting for work.

Substantial evidence also demonstrated the union's influence over the market's thieves. For example, Pontebbi put a former union delegate, Anthony O'Connor (charged in the indictment as a co-conspirator and presently a fugitive from justice), on the payroll because he thought O'Connor knew who the thieves were and could recover any fish that were stolen. Carmine's brother, Vincent Romano, was hired for the same reason at $450 per week. Although Pontebbi claimed that O'Connor and Vincent Romano were hired to watch the other watchmen, none of the men who actually patrolled Fulton Market ever saw either man there.

Companies that suffered thefts came to Carmine Romano when they wanted reimbursement from the Fulton Patrol Service, which guaranteed against theft. After the burglary of Booth Fisheries, Carmine told the president of Booth that he "hoped to get the people that committed the burglary, and if they did. . . . they would be sorry they were born." After Peter took over control of Local 359, companies reported thefts to him.

The evidence also showed that the union systematically collected cash "Christmas payments" from the wholesalers in the Fulton Fish Market each December from 1975 through 1979. To insulate Carmine Romano and the other union officials, the payments were ordinarily solicited and collected by other businessmen, who told the solicitees that the money ($300 per wholesale stand per Christmas) was for "the boys at the union." A number of businessmen testified that they would not have made these "Christmas payments" if they had not been asked to, and that they believed the payments to be illegal. When asked why he had paid, Arnold Smith, of Caleby Haley & Co. said, "because everybody else was paying it and because we did

not wish to create problems where no problems existed." In December of 1979, the Fishmongers Association gave $2400 to the union in lieu of individual contributions. This money was paid, as were all the contributions, in cash.

Occasionally, the union officers were directly involved in collecting the "Christmas payments." In December of 1977, either Carmine Romano or Anthony O'Connor approached the president of Commercial Fish Co., Philip Bartone, and said "everybody was going along giving to the boys [in the union] for Christmas," instructing Bartone to drop the money off at the T & S Fish Co.[1] In December 1978, an employee of Booth Fisheries personally delivered Booth's $300 "Christmas present" to Carmine Romano.

Another method used to extract money from the Fulton Market merchants was the rental of cardboard union signs to them for $25 per month. The businessmen who rented these signs did so because everyone else was doing it and in spite of the fact that many of them believed the rentals to be illegal. Most testified that the signs (which arguably had some goodwill value) were not worth $25 per month—yet no one ever stopped renting. The president of N. P. Levy and Co., Terrence Levy, even placed the sign under the air conditioner, out of sight, while continuing to pay the $25 each month. Bartone testified that he rented the sign even though it wasn't worth the money because "I thought it was necessary to get [a union sign] to run the business. I didn't like the idea, but I thought it was necessary to continue running my business."

Another scheme by which Carmine Romano and his co-conspirators profited was through the misuse of union welfare and pension funds. Between 1974 and 1979, Carmine, as trustee of the pension fund, directed the deposit of over $168,000 of the pension fund's money in the Republic National Bank, keeping for himself and his co-conspirators over $10,000 worth of color television sets given by the bank as gifts to the sponsors of new accounts.

Republic National Bank officials testified that the bank gave these gifts regularly to the sponsors of new accounts. Only the

sponsor, and not the account's owner, was eligible to receive the gift. However, the sponsor could designate anyone (other than the owner) to receive the gift. Moreover, if asked, the bank would have given cash rather than the television sets. Thus, the sponsors could have taken the gifts in the form of cash and turned it over to the pension fund. Here, however, the sponsors of the pension fund's new accounts (two union secretaries, the union accountant, and union delegate Anthony O'Connor) turned over to the pension fund none of the seventeen color television sets given by the bank as gifts for sponsoring the new accounts. Furthermore, if the moneys had been deposited in a commercial bank, rather than the Republic National Bank, the pension fund would have received $10,000 more in interest than it received from the Republic National Bank. Neither Romano nor the other trustees disclosed in the minutes of the pension fund that they had received these TV sets, nor did they disclose the gifts in the annual report to the beneficiaries of the pension fund or in reports required to be filed with the Department of Labor.

On January 14, 1981, Peter Romano in response to a subpoena requiring him to produce for the grand jury "All records, papers, correspondence, and documents in any way related to union shop cards, union signs or union plaques . . .," falsely testified before the grand jury that he had no such documents. In fact, he had and knew that he had in his possession: (1) a telegram from the International President of the United Food and Commercial Workers Union (with which Local 359 was affiliated), advising him that rental of union signs violated the union constitution, and (2) a copy of a letter from the International's Vice-President to the International President advising of a conversation with Peter Romano in which Romano had indicated he would immediately stop the rental of union placards.

Neither defendant took the stand at trial. Peter Romano called no witnesses; Carmine Romano called two witnesses who testified that the union's welfare and pension benefits increased during his tenure and that commercial banks offer some advantages over savings banks despite the lower rate of interest.

The trial concluded on October 30, 1981, when the jury convicted the defendants on all counts and found that they

should forfeit their union positions under 18 U.S.C. § 1963. Prior to sentencing, the court revoked Carmine Romano's bail and remanded him to custody as a continuing danger to the community. We affirmed that order on November 3, 1981.

The court conducted a sentencing hearing on February 2 and 3, 1982, at which government witnesses testified to Carmine Romano's ties to the Genovese organized crime family, to the fear he generated in the Fulton Fish Market, and to his control of a number of illegal activities there. The court found that "the Fulton Fish Market is permeated by fear generated by organized crime, and . . . the proceeds of illegal activities are going to the coffers of organized crime . . ." It sentenced Carmine to twelve years and a $20,000 fine, noting that there "is enough in this case in connection with Mr. Carmine Romano, outside of what I heard and even the [sentencing] hearing here to justify the sentence that I am going to impose in this case."

II.

The principal issue in this case is whether the receipt by Carmine Romano and his co-conspirators of television sets given by the Republic National Bank as gifts for the opening of accounts by the union pension fund constituted a crime under 18 U.S.C. § 1954. That statute punishes any trustee of an employee pension benefit plan who "receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning such plan. . . ." Here, Carmine received (and aided others to receive) television sets as gifts because of his actions in directing the deposit of union pension funds, and with the intent to be influenced in the disposition thereof.[2] Carmine concedes that his conduct falls "within the literal sweep of the statute's language." However, he argues that the receipt of those gifts was not illegal because it was proper to deposit union pension funds in a bank that gives gifts to all members of the public opening accounts. Although

keeping the television sets might have constituted embezzlement, he argues, their receipt was lawful. We disagree.

Romano's argument rests on indications in the legislative history that Congress was most concerned with kickbacks. Since the gifts-for-deposit were not kickbacks, but were offered on non-preferential basis to all depositors, he argues that the statute should not be interpreted to reach his conduct. And indeed, kickbacks were the main concern of Congress. *See* Rep. No. 908, 87th Cong., 1st Sess., 4-5, 11 (1961); 108 Cong. Rec. 1730 (remarks of Rep. Roosevelt) (1962). However, the legislative history reveals that Congress intended to reach "other conflict-of-interest payments" as well as kickbacks, H.R. Rep. No. 998, 87th Cong. 1st Sess. 7 (1961), and to establish "Federal criminal sanctions for violations of trust." 108 Cong. Rec. 1924 (1962) (remarks of Sen. McNamara). Thus, Congress used very broad language to prohibit receipt of "any fee, kickback, commission, gift, loan, money, or thing of value," rather than just kickbacks. Moreover, the statute punishes the receipt of any of these things either "because of," or "with the intent to be influenced" with respect to, any action or decision concerning a pension fund. If only corrupt transactions were intended to be covered, Congress would not have added the "because of" clause, but would have limited the statute to those possessing the intent to be influenced.[3] In short, the broad language used in the statute reflects Congress's intent to reach all fiduciaries who profit (other than by their regular compensation) as the result of their decisions to invest union pension funds.[4]

Romano also claims that this construction of the statute is a "technical" one that punishes the receipt of "customary" business gifts and is therefore contrary to the interpretation of the Department of Justice. S. Rep. No. 908, 87th Cong., 1st Sess., 15-16 (1961). However, the receipt of over $10,000 worth of color television sets cannot be deemed a "de minimis business or social gratuit[y]." *Id.* Nor, in view of the jury's finding that Carmine had the specific intent to violate the statute, can this be deemed a "technical," innocent violation.

Romano's argument that he should have been prosecuted for embezzlement under 18 U.S.C. § 664 rather than under § 1954

is also unavailing. Section 664 punishes the embezzlement of "any of the moneys, funds, securities, premiums, credits, property, or other assets of any" union pension plan. Had Carmine been charged under this statute, he surely would have argued that the television sets were not the property of the pension plan, as the bank did not give (and would not have given) the sets to the pension fund, but only to the individual sponsors of new accounts.

Next, Carmine Romano argues that the district court improperly admitted evidence of the "Christmas payments," the Fulton Patrol Service, and the state of mind of the wholesalers. This evidence, he asserts, was irrelevant and prejudicial. These errors were compounded, he claims, by the prosecutor's summation and rebuttal.

We find no error in the district court's evidentiary rulings. Count One of the indictment charged Carmine with conspiring to conduct the affairs of the Fulton Fish Market through a pattern of racketeering activity. This pattern was alleged to include extortion in the form of the Fulton Patrol Service protection racket, the collection of "Christmas" gifts from the Fulton Market merchants, and the "rental" of union placards. Clearly, proof of such activities was relevant to the charge of conspiracy, as was proof that the wholesalers made these payments to the union out of fear. Carmine's complaint seems to be that the court instructed the jury only as to the predicate acts of racketeering activity charged in the substantive RICO count, which did not include extortion. However, his failure to object to the charge bars that claim here.

Second, we hold that the prosecutor's repeated references to the fear generated by Carmine Romano in the Fulton Fish Market were not improper. In his summation, the prosecutor was entitled to argue that the conspiracy charge—which alleged payments extracted through the use of fear—had been proven by the evidence. Nor was the rebuttal improper in view of the defendants' closing arguments that the union sign rentals did not constitute extortion and that there was no evidence that the wholesalers "signed that [rental] agreement out of fear, out of threats, out of intimidation." [5]

The defendants also argue that their convictions for conspiracy must be reversed because the conspiracy count was predicated on Taft-Hartley violations, 29 U.S.C. § 186(b)(1), which require no *mens rea* (*i.e.*, knowing or criminal intent). They reason that "one cannot conspire to commit a crime which does not require proof of *mens rea*." However, the defendants were not charged with conspiring to violate the Taft-Hartley Act; they were charged with conspiracy to violate the RICO statute, 18 U.S.C. § 1962. Moreover, the court instructed the jury that it must find intent to conspire, and that "with an understanding of the unlawful character of a plan, [the defendant] knowingly and wilfully join[ed] in an unlawful scheme." To the extent that conspiracy requires proof of "corrupt motive or intent," as the defendants claim, the charge gave the defendants everything to which they were entitled. *See United States v. Scotto*, 641 F.2d 47, 55-56 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981).[6]

Nor is there any merit to Carmine Romano's claim that the twelve-year sentence imposed on him was improper because the district court did not make specific findings after the sentencing hearing and thus may have relied on false information in sentencing him more severely than his brother. The district court specifically stated that the sentence was justified by what it knew of Carmine Romano's background even without reference to the sentencing hearing.[7] Indeed, our review of the trial transcript suggests that the sentence was lenient.

The claim that the defendants were deprived of a public trial because the district court locked the courtroom doors while it charged the jury is frivolous. Members of the public were permitted to be and were present within the courtroom during the charge. Locking the door while the charge was read was a reasonable limitation to ensure that the jury was properly instructed without distraction. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581-82 n.18 (1980). Indeed, no one even tried to enter the courtroom while the doors were locked.

Equally without merit is Peter Romano's claim that he was denied due process because the government failed to give him fair notice that rental of union signs violated the Taft-Hartley

Act even though he assumed union office one year after the Government began its investigation. The government was under no obligation to inform him that his conduct violated the law. That obligation arises only in those rare cases where the "conduct made criminal is wholly passive and . . . 'circumstances which might move one to inquire as to the statutory duty are completely lacking.' " *United States v. Keuylian*, 602 F.2d 1033, 1043 (2d Cir. 1979). Here, the collection of money from the Fulton Market merchants could hardly be described as "wholly passive." And it stretches the imagination to suggest that in these circumstances Peter Romano was completely unaware that such transactions were illegal.

Peter Romano also claims that his false grand jury testimony was not material. He does not contest the sufficiency of the evidence that he deliberately lied when he told the grand jury that he held no documents responsive to a subpoena duces tecum seeking records relating to rental of union signs to employers. Those documents, if produced, would clearly have helped the grand jury inquiry. For example, they were probative of his state of mind, which was relevant to the possible RICO and extortion charges. Thus, the perjury was material under 18 U.S.C. § 1623. *See United States v. Berardi*, 629 F.2d 723, 728 (2d Cir.), *cert. denied*, 449 U.S. 995 (1980).

The defendants' final claim is that the district court erred in admitting the hearsay evidence about the Christmas payments. Eight wholesalers testified that they made cash "Christmas payments" to other wholesalers at the request of the latter, and were told that the money was for the union. The issue is whether the district court clearly erred in finding there was sufficient independent evidence that there was a conspiracy, that each defendant was a member of that conspiracy, and that the statements were made in furtherance of that conspiracy. *See United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). After reviewing the trial record, we cannot say that the district court's finding was clearly erroneous. For example, Carmine Romano personally accepted one of the "Christmas payments." Peter Romano admitted to one wholesaler that people in the market gave money to the union at

Chirstmas time. The evidence linking the co-conspirators to the conspiracy is the fact that they picked up the money. Even if the district court's *Geaney* finding was clearly erroneous, the requests to give the money to the "boys in the union" were admissible as "an utterance which was contemporaneous with an independently admissible nonverbal act . . . and which relates to that act and throws some light upon it." *United States v. Glasser*, 443 F.2d 994, 999 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971).

Accordingly, the judgments of conviction are affirmed. The mandate shall issue forthwith.

FOOTNOTES

[1] Following his instructions, Bartone gave $300 to Julius Sirowitz, the boss of the T & S Fish Co., telling him, "This is for the boys in the union." Sirowitz apparently collected "Christmas payments" from other wholesalers, too. For example, he told Terrence Levy, president of N.P. Levy & Co., that he was "elected" to collect $300 for Carmine Romano and Anthony O'Connor. In this instance, however, Levy refused to pay because the union had not sent anyone to his father's funeral and he was still upset about the lack of respect that showed.

[2] Although § 1954 does not require proof of a corrupt intent, the court instructed the jury that to convict on these counts it had to find that the defendant acted with a "bad purpose," and "with the specific intent to do something the law forbids." By its verdict, the jury necessarily found that Carmine Romano received the gifts with corrupt intent. The defendant did not object to these instructions.

[3] Even if Congress intended to limit the statute to corrupt transactions, the jury found that Carmine Romano possessed the corrupt intent to be influenced in the deposit of the union's pension funds. *See* note 2, *supra*.

[4] The statute expressly permits a fiduciary to receive a "bona fide salary" or "compensation" for "services actually performed in the regular course of his duties as . . . trustee. . . ." 18 U.S.C. § 1954. Of course, the defendant's receipt of the television sets was not such compensation.

[5] Defendants also claim that the prosecutor improperly argued that the "union plaque was a fake and a sham and the International Secretary had never signed it." The prosecutor's remarks were fair comment on the physical evidence and went to the defendants' intent to conspire to violate the RICO statute.

[6] The defendants argue that the enhancement of non-*mens rea* misdemeanors (the Taft-Hartley violations) into a felony under RICO, 18 U.S.C. § 1962(c), is unconstitutional. This argument is frivolous. *United States v. Scotto*, *supra*.

[7] The court may have been referring to the fact, emphasized by the prosecutor in his argument at the sentencing hearing, that two witnesses had chosen to suffer imprisonment for contempt rather than testify at trial following the grant of immunity. One, Alec B. Messing, of the Messing Fish Co., had already served 90 days and been fined $66,000 for a similar refusal to testify in a parallel civil case. Messing's lawyer told the court (out of the presence of the jury) that the reason his client refused to testify was that death threats had been made against Messing and his family. Similarly, Glenn Kaggen, an employee of Messing Fish Co., continued to refuse to testify even after the judge sentenced him to six months imprisonment for civil contempt. He told the judge the reason he would not answer any questions was "fear."

Moreover, there was ample evidence adduced at trial showing that Carmine was feared throughout the Fulton Fish Market. For example, the union's long time accountant, Walter Cole, admitted (after a minute of dead silence in which he weighed his answer) that the reason he lied to the grand jury about Carmine's participation in the Fulton Patrol Service was because he was afraid of Carmine. Frank Bearese, of the Finest Fillet Co., testified that when he was first asked for a $300 Christmas payment to the union in 1975, he felt "[s]ort of a sick feeling in my stomach because it had never happened before in all the years I have been down in the market."

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Nos. 82-322 and 82-329

In the Supreme Court of the United States

OCTOBER TERM, 1982

CARMINE ROMANO, PETITIONER

v.

UNITED STATES OF AMERICA

PETER ROMANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1954 prohibits a trustee of a union pension fund from accepting television sets from a bank as gifts for opening accounts with pension fund assets.

2. Whether the district court properly instructed the jury on the element of willfulness under the Taft-Hartley Act, 29 U.S.C. 186.

3. Whether petitioner Carmine Romano's convictions under the RICO statute, 18 U.S.C. 1962, violated the Due Process Clause of the Fifth Amendment, because the alleged "racketeering activities" included criminal offenses not requiring mens rea.

4. Whether the district court deprived petitioners of their right to a public trial by locking the courtroom while it charged the jury.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a)[1] is reported at 684 F.2d 1057.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1982. The petitions for a writ of certiorari were filed on August 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]References are to the appendix in No. 82-322.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner Carmine Romano was convicted on one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) (Count 2); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d) (Count 1); 12 counts of misusing union pension funds, in violation of 18 U.S.C. 1954 and 2 (Counts 3-14); 46 counts of aiding and abetting the receipt of illegal labor payments, in violation of the Taft-Hartley Act, 29 U.S.C. 186(b)(1), and 18 U.S.C. 2 (Counts 15-60); and one count of personally receiving an illegal labor payment, in violation of 29 U.S.C. 186(b)(1) (Count 92). Petitioner Peter Romano was convicted on the RICO counts (Counts 1 and 2); on 31 Taft-Hartley counts (Counts 61-91); on one count of perjury before a grand jury, in violation of 18 U.S.C. 1623 (Count 166); and on one count of obstructing justice, in violation of 18 U.S.C. 1503 (Count 167).

Carmine Romano was sentenced to concurrent 12-year terms of imprisonment on Counts 1 and 2; one year's imprisonment on Counts 3 to 14, to be served consecutively to each other but concurrently with the sentence on Counts 1 and 2; and six months' imprisonment on Counts 15 to 24, 34 to 60, and 114, to be served consecutively to each other but concurrently with the sentences on the other counts. In addition, he was fined $10,000 on each of Counts 1 and 2. Peter Romano was sentenced to concurrent 18-month terms of imprisonment on Counts 1 and 2; six months' imprisonment on Counts 61 to 91, to be served concurrently with each other and with the sentences on Counts 1 and 2, and five years' imprisonment on Counts 166 and 167, all but six months of which were suspended, to be served

concurrently with the sentences on the other counts. In addition he received a five-year term of probation. The court of appeals affirmed (Pet. App. 1a-18a).

1. The evidence as summarized in the opinion of the court of appeals showed as follows. Petitioner Carmine Romano was the Secretary-Treasurer of Local 359 of the United Seafood Workers Union in New York City from May 1974 until May 1980, when his brother, petitioner Peter Romano, succeeded him. Carmine then assumed a newly created position as the Executive Administrator of the Fulton Fish Market Welfare and Pension Trust Funds, and thus he became a trustee of the Union's pension fund (Pet. App. 6a).

In 1975, the New York Wholesale Fish Dealers Association asked Carmine for assistance in stopping thefts that were plaguing the Fulton Fish Market. Shortly thereafter, Carmine created a watchmen's service called the Fulton Patrol Service. Between November 1975 and October 1981, the Patrol Service collected over $644,000 from the wholesale fish merchants (Pet. App. 6a-7a).

The Patrol Service's success in reducing the incidents of theft was due more to the influence of Carmine and his co-conspirators over the thieves than to the quality of the watchmen's service. For instance, John Pontebbi, who ran the Patrol Service on a day-to-day basis, hired Anthony O'Connor because he thought O'Connor knew who the thieves were and thus could recover the stolen fish (Pet. App. 7a).[2]

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[2]Carmine's brother Vincent was hired for the same reason. Moreover, a number of watchmen listed on the payroll did not exist (though their checks were cashed), one of the watchmen was a kleptomaniac who stole fish from the market himself, and another watchman who did patrol the market knew of only one other watchman who actually worked for the Patrol Service (*id.* at 7a).

In addition, the union systematically collected cash "Christmas payments" from the wholesalers each December from 1975 through 1979. The payments were ordinarily solicited and collected by other businessmen, who told the fish merchants that the money was for "the boys at the union" (Pet. App. 8a). Many merchants, who believed the payments were illegal, would not have made them but for the request on behalf of petitioners (*ibid.*).[3]

The union also extracted money from the Fulton Market merchants through the rental for $25 per month of cardboard union signs. The businessmen who rented these signs did so because everyone else was doing it and in spite of the fact that many of them believed the rentals were illegal. Almost no merchant believed the signs were worth $25 per month (Pet. App. 9a).

In addition, Carmine and his co-conspirators profited through the misuse of union welfare and pension funds. Between 1974 and 1979, Carmine, as trustee of the pension fund, directed the deposit of over $168,000 of the pension fund's money into the Republic National Bank, keeping for himself and his co-conspirators over $10,000 worth of color television sets given by the bank as gifts to the sponsors of the new accounts. The sponsors could have taken the gifts in the form of cash and contributed the money to the pension fund, but did not do so. Moreover, depositing the money in the Republic National Bank instead of a commercial bank cost the pension fund approximately $10,000 in interest. Neither Carmine nor the other trustees disclosed in the

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[3]Occasionally, the union officers were directly involved in collecting the "Christmas payments." In December of 1977, either Carmine or Anthony O'Connor requested the president of Commercial Fish Co., Philip Bartone, to drop his Christmas payment off at the T&S Fish Co. In December 1978, an employee of Booth Fisheries personally delivered Booth's $300 "Christmas present" to Carmine (*id.* at 8a-9a).

minutes of the pension fund that they had received these TV sets, nor did they disclose the gifts in the annual report to the beneficiaries of the pension fund or in reports required to be filed with the Department of Labor (Pet. App. 10a).

When the district court prepared to deliver its instructions to the jury, it ordered the courtroom doors locked, over petitioners' objection, in order to eliminate unnecessary distractions. No one in the courtroom was required to leave, and no one tried to enter the courtroom during the time the doors were locked (Pet. App. 17a).

2. The court of appeals affirmed petitioners' convictions (Pet. App. 1a-18a). It held that 18 U.S.C. 1954, which prohibits a trustee of a pension fund from receiving "any" gift "with intent to be influenced with respect to, any" decisions concerning the pension fund was violated by petitioner Carmine Romano's receipt of television sets in return for approving the deposit of the union fund's assets in Republic National Bank accounts (Pet. App. 12a-14a). The court also rejected as "frivolous" (*id.* at 16a n.6) petitioners' claim that it would violate due process to convert their misdemeanor Taft-Hartley violations (29 U.S.C. 186(b)(1)), which did not require proof of mens rea,[4] into a felony on the basis of the RICO statute, 18 U.S.C. 1962(c). Finally, the court held that closing the courtroom doors during the instructions was a "reasonable limitation to ensure that the jury was properly instructed without distraction" (Pet. App. 17a).

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[4]Petitioners acknowledged in their appeal briefs that the Second Circuit previously had held in a long line of cases (see page 8, *infra*) that 29 U.S.C. 186(b)(1) does not require proof of criminal intent, but they preserved this issue by requesting the court of appeals to reconsider its decisions (82-1052 App. Br. 59; 82-1054 App. Br. 42). The court of appeals did not, however, discuss this issue in its opinion.

ARGUMENT

1. Petitioner Carmine Romano contends (82-322 Pet. 7-16) that his receipt of television sets from the Republic National Bank as gifts for opening accounts on behalf of the union pension fund fell outside the scope of 18 U.S.C. 1954. This claim is without merit.

Section 1954 prohibits a pension fund trustee, which petitioner Carmine Romano was, from receiving "any * * * gift * * * with intent to be influenced with respect to, any of the actions * * * relating to any question or matter concerning such plan * * *." Apparently conceding that his actions violate the literal meaning of Section 1954 (Pet. 8), petitioner contends that the legislative history of the statute indicates that Congress was concerned with kickbacks and that gifts-for-deposit, which are offered on a nonpreferential basis to all depositors, are not kickbacks.

To be sure, kickbacks to pension fund trustees were the main concern of Congress in enacting Section 1954. See S. Rep. No. 908, 87th Cong., 1st Sess. 4-5, 11 (1961); 108 Cong. Rec. 1730 (1962) (remarks of Rep. Roosevelt). But the legislative history reveals that Congress intended to reach "other conflict-of-interest payments" (H.R. Rep. No. 998, 87th Cong., 1st Sess. 7 (1961), and to establish "[f]ederal criminal sanctions for violations of trust." 108 Cong. Rec. 1924 (1962) (remarks of Sen. McNamara). Consistent with this intent was Congress' use of very broad language to describe the activities prohibited by the statute. Petitioner Carmine Romano points to nothing in the legislative history that indicates that Congress did not intend "to make punishable all conduct falling within the reach of the

statutory language." *United States* v. *Culbert*, 435 U.S. 371, 377 (1978).[5]

2. Petitioners next contend (82-322 Pet. 16-19; 82-329 Pet. 2 n.1) that the district court improperly instructed the jury on the element of willfulness under the Taft-Hartley Act, 29 U.S.C. 186. The district court instructed the jury that "the government need not prove that the defendant knew about the Taft-Hartley Act or acted with a bad purpose or a specific purpose to violate the statute" (Tr. 1512-1513). Petitioner argues that the court erred in failing to instruct the jury that it was required to find that petitioner knew his actions were unlawful or that he acted with a reckless disregard of their lawfulness.

In *United States* v. *Ryan*, 350 U.S. 299, 305 (1956), this Court reviewed the legislative history of Section 186 and observed that it is "a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative." Subsequently, the Second Circuit has ruled in a series of cases that Section 186

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[5]Petitioner's reliance (82-322 Pet. 14) on a letter from the Department of Justice to Congress during the latter's consideration of Section 1954 is misplaced. See S. Rep. No. 908, 87th Cong., 1st Sess. 15-16 (1961). Although the Department did express concern about applying the statute to "de minimis business or social gratuities" (*id.* at 16), the court of appeals correctly found that "the receipt of over $10,000 worth of color television sets cannot be deemed a 'de minimis business or social gratuit[y]' " (Pet. App. 14a).

Petitioner further argues (82-322 Pet. 15-16) that because Section 1954 punishes the donor as well as the recipient of the "gift," the court's construction of the statute could make bankers "criminally liable for the widespread use of nonpreferential gifts-for-deposit." Petitioner overlooks, however, that it was the receipt of the television sets *for his own use* and his failure to turn them over to the pension fund that violated Section 1954. Accordingly, a banker would be liable under the statute only if he knew that a pension fund trustee intended to keep the "gift" for himself.

does not require proof of knowledge that the conduct is illegal, and has approved the substance of the instructions given by the district court. This Court has consistently declined to review those decisions. See *United States* v. *Overton*, 470 F.2d 761, 767 (2d Cir. 1972), cert. denied, 411 U.S. 909 (1973); *United States* v. *Ricciardi*, 357 F.2d 91, 100 (2d Cir.), cert. denied, 384 U.S. 942 (1966). See also *United States* v. *Scotto*, 641 F.2d 47, 55 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981); *United States* v. *Boylan*, 620 F.2d 359, 361-362 (2d Cir.), cert. denied, 449 U.S. 833 (1980). Nothing in the present case makes it more deserving than those cases of this Court's consideration.[6]

Notwithstanding petitioner's assertion (82-322 Pet. 17-19), the decision below does not conflict with holdings of the Seventh and Tenth Circuits. Any contrary suggestion in the language of the Seventh Circuit's decision in *United States* v. *Inciso*, 292 F.2d 374, 380, cert. denied, 368 U.S. 920 (1961), has been disapproved by the later decision of that court in *United States* v. *Keegan*, 331 F.2d 257, 261-262, cert. denied, 379 U.S. 828 (1964), which held that in a prosecution under 29 U.S.C. 186, the jury need not be instructed that the defendant must have acted with knowledge of the law. The *Keegan* court thus approved an instruction that "[t]he word 'knowingly' * * * does not require * * * that there be any knowledge or awareness that such act or omission is in fact prohibited by law." 331 F.2d at 261. Accordingly, the instruction given here almost certainly would be acceptable in the Seventh Circuit.[7]

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[6]The Third Circuit is squarely in agreement with the Second Circuit's interpretation of 29 U.S.C. 186. See *United States* v. *Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973); *United States* v. *Lanni*, 466 F.2d 1102, 1110 (3d Cir. 1972).

[7]Petitioner Carmine Romano errs in suggesting that either *United States* v. *Kaye*, 556 F.2d 855, 863-864 (7th Cir.), cert. denied, 434 U.S. 921 (1977), or *United States* v. *Simpson*, 561 F.2d 53, 61-62 (7th Cir.

In *Korholz* v. *United States*, 269 F.2d 897, 903 (10th Cir. 1959), cert. denied, 361 U.S. 929 (1960), the Tenth Circuit termed as "accurate" an instruction that required the jury to find either specific intent to violate Section 186 or reckless disregard for the law, but the court did so in the course of affirming a conviction based on the more stringent instruction. Since the instruction approved there was favorable to the defendants, the court was not called upon to decide whether such an instruction was necessary. Clearly a holding that the charge requested by a defendant was not prejudicial to him is a far cry from a holding that such a charge is necessary. Accordingly, there is no reason to assume the Tenth Circuit would reach a result different from the holding below in a case in which the substantive standard for willfulness was contested by a defendant as inadequate.

3. The "racketeering activities" upon which petitioner Carmine Romano's RICO convictions were predicated included Taft-Hartley violations, 29 U.S.C. 186(b)(1). Petitioner contends (82-322 Pet. 19-21) that Taft-Hartley violations may not, consistent with the Due Process Clause of the Fifth Amendment, serve as predicate acts of racketeering because they contain no mens rea element.[8]

The RICO charges against petitioner, however, were predicated on several violations of 18 U.S.C. 1954, as well as on the Taft-Hartley violations. Since the jury convicted petitioner on the substantive counts charging the violations of Section 1954, it is clear that it believed petitioner

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1977), supports his position. The only question in *Kaye* was the sufficiency of the evidence. The opinion does not set forth the district court's charge, but expressly restates the holding in *Keegan* on this point. *Simpson* did not involve Section 186 at all.

[8]Petitioner does not dispute that under 18 U.S.C. 1961(1)(C) " 'racketeering activity' means * * * any act which is indictable under title 29, United States Code, section 186 * * *."

committed at least two acts of racketeering apart from the Taft-Hartley offenses. Accordingly, even if petitioner were correct on the merits, his RICO convictions would not be affected.

In any event, petitioner's claim is unfounded. The district court instructed the jury that to be guilty of a substantive RICO offense a defendant must act "wilfully" (Tr. 1556) and "with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law" (Tr. 1522-1523, 1524-1525, 1568-1569). The court similarly instructed that a defendant could not be found guilty of conspiracy unless, "with an understanding of the unlawful character of a plan, [he] knowingly and wilfully joins in an unlawful scheme" (Tr. 1561-1562). Moreover, the court clearly explained to the jury the difference between the intent required to violate the Taft-Hartley Act and the "criminal intent" necessary to violate or conspire to violate the other offenses charged (Tr. 1512-1513, 1522-1523, 1524-1525, 1568-1569). It is therefore simply not true that the inclusion of Taft-Hartley offenses as predicate acts of racketeering enabled the jury to convict petitioner on the RICO counts without a finding of criminal intent. Accordingly, petitioner's claim must fail.

4. Petitioners contend (82-322 Pet. 22-24; 82-329 Pet. 3-10) that the closing of the courtroom doors during the district court's charge to the jury violated their right to a public trial in violation of the Sixth Amendment. This contention is frivolous.

The Sixth Amendment, of course, guarantees the accused a right to a public trial. See, *e.g.*, *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 580 (1980) (opinion of Burger, C.J.); *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 382-384 (1979). But "[t]he requirement of a public trial is satisfied by the opportunity of members of the public and

the press to attend the trial and to report what they have observed." *Chandler* v. *Florida*, 449 U.S. 560, 569 (1981), quoting *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 610 (1978). Here, any member of the public or press who wished to observe the charge to the jury was allowed access to the courtroom. In fact, several members of the public were in the courtroom throughout the jury charge, and no one was actually denied entrance to the courtroom (Pet. App. 17a).

Moreover, to the extent that the practice of closing the courtroom during instructions implicates the Sixth Amendment at all, it is apparent that the Court's order was a reasonable limitation on courtroom traffic and noise designed to eliminate distraction of the jury during the critical charging period. As the Chief Justice recently observed in *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, 448 U.S. at 581-582 n.18: "Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, see, *e.g.*, *Cox* v. *New Hampshire*, 312 U.S. 569 (1941), so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial * * *. It is far more important that trials be conducted in a quiet and orderly setting than it is to preserve that atmosphere on city streets." See also *Gannett Co.* v. *DePasquale*, 443 U.S. at 388 n.19 (trial court has broad discretion to control spectators in courtroom); *United States ex rel. Orlando* v. *Fay*, 350 F.2d 967 (2d Cir. 1965), cert. denied, 384 U.S. 1008 (1966).[9] The decision

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[9]The state cases upon which petitioner Peter Romano relies do not aid his cause. In *McKibben* v. *State*, 187 Ga. 651, 2 S.E.2d 101 (1939), *People* v. *Buck*, 46 Cal. App. 558, 116 P.2d 160 (1941), and *State* v. *Gibb*, 303 N.W.2d 673 (Iowa 1981), the courts rejected claims similar to petitioners' claim here. In *People* v. *Micalizzi*, 223 Mich. 580, 194 N.W. 540 (1923), one of the defendant's attorneys was among those excluded

to close the courtroom doors for a short period to assist the jury is reasonable and raises no issue warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1982

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from the courtroom during the reading of the instructions to the jury. In *State* v. *Lawrence*, 167 N.W.2d 912 (Iowa 1969), the courtroom was completely emptied of spectators before the instructions were read.

Nor is Peter Romano aided by his telephonic survey (82-329 Pet. 8-10). That approximately half of the jurisdictions in the country do not close the courtroom during the jury charge—assuming such is the case—does not in any way suggest that those jurisdictions interpret the Sixth Amendment as prohibiting such action.

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Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Petitioner has sought the granting of a writ of certiorari to review the June 24, 1982 judgment of the United States Court of Appeals for the Second Circuit upon the ground that his Sixth Amendment right to a public trial was violated by the trial court's locking of the courtroom doors—over defense objection—during the court's charge to the jury. Petitioner submits this brief reply to correct a factual error in Respondent's brief ("RB") and to succinctly demonstrate the inapplicability of the arguments made, and the legal precedents relied upon, by the Government.

ARGUMENT

The Government's Opposition to the Granting of Certiorari on Petitioner's Sixth Amendment Public Trial Point Runs Contrary to This Court's Decisions and the Long Tradition of Open Proceedings

1. Respondent argues in its brief that Petitioner was not denied his right to a public trial by the locking of the courtroom doors during the court's instructions to the jury because "no one was actually denied entrance to the courtroom" (RB 11). The record does not support this contention for two reasons.

First, the court's charge was given in two segments—before lunch (Tr. 1493-1539) and after lunch (Tr. 1551-81). Although the doors were locked at the beginning of each segment (Tr. 1493, 1551), the only effort by the trial judge to determine whether anyone tried to enter the courtroom during the charge occurred at the lunch break (Tr. 1540). There is absolutely no indication that various persons did not attempt to attend the second segment of the charge only to be barred by the courtroom's locked doors.

Second, at the lunch break the court asked the marshal: "Did anyone try to enter the courtroom while you were outside?" (Tr. 1540), and the marshal replied in the negative. There is no indication in the record as to whether the marshal was outside the locked door for all, some, or only a small portion of the time during which the court was charging the jury.

Thus, the Government's contention that no one tried to enter the courtroom during the charge is supportable only for such unknown portion of the pre-lunch segment of the charge as the marshal was outside the locked door. We submit that, in the absence of any reliable evidence either way on this point, this Court should consider this issue upon the basis of what is factually known and undisputed: that the trial court ordered the courtroom doors locked during its charge so as to bar the ingress or egress of any members of the public. Our suggestion is buttressed by the fact that it has long been held that a defendant need not make an affirmative showing of prejudice to establish

a violation of his right to a public trial. *See, e.g., United States ex rel. Latimore v. Sielaff*, 561 F.2d 691, 694 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978); *Davis v. United States*, 247 F. 394, 398-99 (8th Cir. 1917)

2. Relying upon *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978), as it was quoted in *Chandler v. Florida*, 449 U.S. 560, 569 (1981), the Government argues (RB 10-11) that the mere *opportunity* of *some* members of the public and the press to be present satisfied the Sixth Amendment. Because members of the public who arrived before the beginning of the charge and who were willing to be locked in the courtroom for the duration of the instructions—a duration of unannounced and uncertain length—were allowed to attend that portion of Petitioner's trial, Respondent claims full compliance with Petitioner's Sixth Amendment rights.

That argument contains two fallacies—one legal, the other factual. First, *Nixon v. Warner Communications, Inc.* did no more—insofar as it is relied upon in Respondent's brief—than uphold certain limitations on the *broadcasting* of a trial. There had been no limitation on the attendance by members of the public and the press at the trial in question—the so-called Watergate trial—but rather only limitations on the broadcasting of certain presidential tape recordings. Thus, Respondent's argument is completely unsupported by the precedent upon which it relies.

Second, most of the public generally has no way of knowing if and when a judge is planning to charge a jury. The locking of the courtroom doors excludes both those who, lacking knowledge of the court's schedule, have not arrived before the judge begins charging and also those who, for any number of reasons, may not be able to remain continuously inside the courtroom during the entire length of the charge—which in some cases will involve a commitment of two or three hours, or even more. Such a limitation on the public's access to a trial is completely at odds with both the centuries-long tradition and the many purposes of open and public trials so thoroughly discussed in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-75

(plurality opn.), 589-97 (concurring opn., Brennan, J.) (1980), and *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 384-87 (majority opn.), 411-33 (concurring and dissenting opn., Blackmun, J.) (1979).

3. The Government also maintains (RB 11) that the closing of the courtroom during the charge "was a reasonable limitation on courtroom traffic and noise designed to eliminate distraction of the jury. . . ." We certainly do not dispute that the public trial right is subject to limitation in appropriate circumstances. We simply maintain that, as the Chief Justice recently said, speaking for a plurality of this Court in *Richmond Newspapers, Inc. v. Virginia, supra* at 581:

> Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public. (Footnote omitted.)

In petitioner's case nothing approaching a finding of necessity[1] was articulated by the trial judge. He simply stated that the locking of the courtroom's doors had been the practice in the Southern District of New York since "the memory of man runneth not to the contrary." (Tr. 1491).[2]

4. Respondent has apparently misread the five state court cases upon which we relied and which we discussed at some length in our petition (pp. 4-6). Each of those cases found the

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1. The only case upon which Respondent relies in which a specific finding of necessity for closing the courtroom during trial was upheld—*United States ex rel. Orlando v. Fay*, 350 F.2d 967 (2d Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966)—involved intimidation and harassment of witnesses by the defendant's family and friends and disruption of the proceedings by the defendant and a member of the audience. The contrast between such a showing and the virtual silence of the record in this case could not be clearer.

2. As we demonstrated in our petition (pp. 8-10) by way of our survey of various jurisdictions throughout the nation, more than half of those jurisdictions have found no need to lock their courtrooms during the charge to the jury, although the potential for minimal "distraction" of the jurors would seem to exist nationwide. Just as a defendant is not entitled to a perfect trial, we suggest that the Sixth Amendment's guarantee of a public trial cannot be defeated by any purported need for the perfect attention of the jury. Were that the case, *all* criminal trials would be held with courtroom doors locked whenever the jurors were in the jury box.

closings of the courtroom during the court's charge to the jury to be a serious violation of a defendant's right to a public trial.[3] Our argument is hardly a "frivolous" one.[4]

CONCLUSION

For the reasons stated above and in our petition, the writ of certiorari should be granted.

Respectfully submitted,

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November 4, 1982

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3. It is true that two of the cases upon which we relied affirmed convictions because the public had in fact not been denied access to the courtroom during the charge and a third found a waiver of the point because of the defendant's failure to object. That the convictions in those cases were affirmed in no way diminishes those courts' legal conclusion: that the prohibition of public access to a criminal trial during the court's charge violates a defendant's right to a public trial.

4. We note that, in using that term (Pet. App. 12a), the Second Circuit had not had cited to it a single one of the cases which we have cited to this Court—the only American cases ever to deal with the issue.